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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1644

In the Matter of

The Claim for Benefits under Article 18 of the Labor Law made by BERTRAM M. DRASSENOWER, WILLIAM SLOMINSKY, WALTER EHRENPREIS, JOHN A. PODRASKY, LAWRENCE ALDOUS, MARIO L. ECHEMENDIA, ALFRED DOVE, ANGELO ENDRIZZI, ENOS E. FRANCIS, VINCENT HARRIGAN, CURTIS LEGRAND, STEPHEN ONDOCIN, LUCY MEAD, LOUIS V. LAURA, JOHN T. KEYS, FELIX A. SEDA, JOHN P. CESTOLA, JOSEPH A. POGGIOREALE, ANTHONY J. MARSELLA, EUGENE M. MCKENNA,
Petitioners,

v.

LOUIS L. LEVINE, as Industrial Commissioner,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This brief is submitted in reply to the Brief for Respondent in Opposition to the instant petition for a writ of certiorari. Respondent, faced with the holding in *Hodory* v. *Ohio Bureau of Employment Services, et al.* (N.D. Ohio 1976) (3 Judge Court), *app. filed,* 44 U.S.L.W. 3686, which unequivocally supports the instant petition, has chosen to emphasize an alleged technical defect in the petition. As demonstrated below, this technical argument is without merit and the petition should be granted as presenting substantial constitutional questions.

Reasons For Granting The Writ

I

The Petition Was Filed Timely

Respondent contends that the instant petition was untimely filed because the ninety-day time period prescribed by 28 U.S.C. § 2101(c) must be computed from December 2, 1975, the date on which the New York Court of Appeals dismissed Petitioners' appeal as of right to that Court from the decision of the Supreme Court, Appellate Division (A-1)*. As demonstrated below, that decision was not a final one and the proper time from which to compute the time limitation is February 12, 1976, the date on which the motion for leave to appeal was denied by the Court of Appeals (A-2).

New York Civil Practice Law and Rules § 5601(b) provides in pertinent part that an appeal as of right to the Court of Appeals lies only where a final order of the Appellate Division has determined an action and where a constitutional question is "directly involved".

In the words of the accepted authority on the procedures and jurisdiction of the New York Court of Appeals:

> "[T]he requirement that a constitutional question be 'directly involved' is not easy to apply. . . . The body of law on this subject is fragmentary and does not permit a definitive statement in all situations." Cohen and Karger, *The Powers of The New York Court of Appeals*, § 54, p. 250 (1952).

Perhaps it is the ambiguity inherent in the New York law with regard to the jurisdiction of the Court of Appeals which resulted in the protective provision of Civil Practice Law and Rules § 5514(a), which provides:

* All page references unless otherwise noted are to Petitioners' Appendices.

> "*Alternate method of appeal.* If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise."

The dismissal of Petitioners' appeal as of right to the Court of Appeals in the present case thus operated to extend their time to move for leave to appeal and deprived the order of the Appellate Division of finality. The filing of the motion for leave to appeal, pursuant to Civil Practice Law and Rules §§ 5514 and 5602, therefore tolled or extended the filing requirement of 28 U.S.C. § 2101(c) in the same manner as the filing of a motion for reconsideration or rehearing suspends the finality of a judgment or tolls the ninety-day requirement. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974); *United States* v. *Healey*, 376 U.S. 75 (1964).

Indeed, had Petitioners filed their petition for a writ with this Court after the December 2, 1975 order, dismissing the appeal as of right to the Court of Appeals, had been entered and without moving for leave to appeal, that petition for certiorari would have been untimely, as premature, and subject to dismissal. For example, in *Matthews* v. *Huwe*, 269 U.S. 262 (1925), the intermediate appellate court affirmed the decision below. Appeals as of right were then presented to the highest court in Ohio, which dismissed on the ground that no "debatable" constitutional question was presented. Writs of error to this Court were thereafter sought and allowed. Subsequently, however, this Court granted motions to dismiss those writs, holding:

> "[T]he plaintiffs in error did not exhaust all their remedies for review by the Supreme Court of the

> state. After their petitions for writs of error as of right were denied, they had under the Ohio practice the right to apply to the Supreme Court [of the state] in its discretion for writs of certiorari to bring the cases to that court for its consideration. No such application was made." *Id.*, at 265.

See also, *Andrews* v. *Virginian Railway Company*, 248 U.S. 272 (1919).

Gotthilf v. *Sills*, 375 U.S. 79 (1963), is also probative. There, after the Appellate Division affirmed the lower court's decision, Petitioner filed a motion in the New York Court of Appeals for leave to appeal, which was denied as jurisdictionally defective for want of a final order below. An appeal to the Court of Appeals as of right was dismissed upon the same ground. The petition for certiorari was dismissed as improvidently granted because Petitioner failed to apply to the Appellate Division for permission to appeal the non-final order to the highest court.*

Similarly, at bar, had Petitioners, after the dismissal of the appeal as of right on the jurisdictional ground, failed to move for leave to appeal, under *Gotthilf* their petition for certiorari would have been premature, since the December 2, 1975 decision was not "[T]he final word of a final court." *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U.S. 548, 551 (1945).

Respondent's contention that the motion for leave to appeal was "superfluous" is inaccurate. The appeal as of right was dismissed upon the ambiguous ground "that no substantial constitutional question is directly involved" (A-1). That critical language might plausibly have been construed to mean either (a) that any constitutional questions directly involved were frivolous or (b) that substantial constitutional questions were presented, but not

* The provision of the New York Civil Practice Act relevant in *Gotthilf* related only to leave to appeal non-final orders and is inapposite at bar.

"directly" involved. *See,* Cohen and Karger, *supra,* § 57. Indeed, Petitioners argued in the Appellate Division and in opposition to the motion to dismiss, *inter alia,* that New York Labor Law § 592.1 was susceptible to two constructions and that only *as interpreted* below was the statute unconstitutional (*see,* A-7). The December 2, 1975 decision (A-1) could, therefore, have been based upon the theory that, as a question of construction was involved, the constitutional issue was only indirectly involved.*

However, the later decision of the New York Court of Appeals denying Petitioners' motion for leave to appeal (A-2) has made it clear that the Appellate Division's reading of § 592.1 of the New York Labor Law, as applying equally to strikers and involuntarily laid off persons, is the settled and authoritative interpretation of the statute. Therefore, the statute raises questions of compliance with the Constitution rather than of statutory interpretation.** The motion for leave to appeal was therefore not gratuitous, but instead was critical to resolve the ambiguity in the Court of Appeal's prior decision.

Moreover, the ability of a party to secure a hearing in this Court should not become a dangling issue, where the right to a hearing can be lost because of the complexities and uncertainties of the procedure for seeking a hearing in the highest state court. This is particularly true since the proper distribution of judicial functions in a federal system requires that litigants in state courts exhaust all reasonable appeals and opportunities to secure a hearing in the highest court of the state before invoking review in this Court. *See, e.g., North Dakota State Board of Pharmacy* v. *Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973).

* Petitioners so argued in the affirmation of Robert S. Cohen in support of the motion for leave to appeal.

** Respondent concedes that the section's construction is settled. (Resp. Br. p. 6).

The authority cited by Respondent is inapposite. In *Department of Banking* v. *Pink*, 317 U.S. 264 (1942), the relevant filing time requirement was held not to have been extended by a motion to amend the Court of Appeal's remittitur as to mere formalities. Significantly, that motion, unlike the motion for leave to appeal in the case at bar, did not seek "alteration of the rights adjudicated." *Id.*, at 266. In *Federal Trade Commision* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952), the petition was held untimely because the subsequent action of the court below neither affected matters of substance nor resolved a genuine ambiguity. *Id.*, at 211-212. Both *American Railway Express Co.* v. *Levee*, 263 U.S. 19 (1923), and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954), reiterate that where the state's highest court is possessed of discretionary appellate jurisdiction, such jurisdiction must be invoked in order to satisfy the principle of finality.

Since, under the holding of *Matthews, supra*, failure to apply for leave to appeal in the instant case would have barred the filing of the within petition as premature, and since under Civil Practice Law and Rules § 5514(a) Petitioners' time was extended following the dismissal of the appeal as of right, it is respectfully submitted that the within petition was timely filed.*

*No case has been found which rules upon the precise question presented here within the context of New York procedure. At a minimum Petitioners are placed in an inescapable dilemma if Respondent's arguments are accepted, since under *Matthews, supra*, failure to move for leave to appeal would have rendered a petition to this Court vulnerable, and the making of such a motion, according to Respondent, was superfluous and rendered the petition untimely. Should this Court clear a path through this labyrinth which overrules *Matthews*, then in fairness to litigants, any such newly stated direction should be given only prospective application. *Cf.*, *Great Northern Railway* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

II

The Disqualification Of Involuntarily Idled Workers Is Constitutionally Impermissible

Respondent asserts, without discussion, that the § 592.1 suspension of benefits furthers the State's policy of neutrality with respect to labor disputes. However, the fallacy of this reasoning, even as applied to payments to strikers, has been recognized. *Lascaris* v. *Wyman*, 31 N.Y.2d 386, 350 N.Y.S.2d 397 (1972), *rearg. denied*, 32 N.Y.2d 705 (1973), *cert. denied*, 414 U.S. 832 (1973).* The suspension of benefits to non-strikers on this ground has been termed the triumph of "seductive cliches" over logic. Fierst, H. and Spector, M., "Unemployment Compensation In Labor Disputes," 49 *Yale L.J.* 461, 464 (1940). *See also, Hodory* v. *Ohio Bureau of Employment Services, et al.* (A-16 to A-30), *app. filed*, 44 U.S.L.W. 3686; "Note-Statute Suspends Un-Employment Benefits Regardless of Employee Fault," 39 *N.Y.U.L. Rev.* 873, 875-876 (1964). Suspension of benefits to workers who are laid off because of a strike in which neither they nor their union were participants, resulting in loss by such persons both of their regular wages and unemployment benefits can serve only to influence disqualified workers to take the employer's side in a dispute and hence to put pressure upon the strikers to resolve their controversy, perhaps upon unacceptable terms.

Weinberger v. *Salfi*, 422 U.S. 749 (1975) and *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), cited by Respondent, are inapposite. In *Weinberger* the duration-of-relationship requirement was termed:

> "[A] widely accepted response to legitimate interests in administrative economy and certainty of coverage for those who meet its [the program's] terms." *Id.*, at 776

*"It may fairly be said that . . . the policy of governmental neutrality in labor controversies is, in reality, little more than an admirable fiction." *Id.*, 31 N.Y.2d at 394, 350 N.Y.S.2d at 402.

Further, the Court found that Congress "could rationally have concluded" that the durational requirement would protect against the specified abuse. *Id.*, at 777.

By contrast, the New York disqualification cannot rationally be conceived to promote State neutrality nor is it a "widely accepted response". In fact, forty-six states and the District of Columbia have by statute or judicial decision determined that persons who lose their employment because of a strike in which they are not participants should have the same eligibility for unemployment benefits as all other involuntarily unemployed workers. *See e.g.*, Fierst & Spector, supra, p. 462 n. 5 and Appendix; *Usher* v. *Department of Industrial Relations,* 261 Ala. 509, 75 So.2d 165 (1954); *Chrysler Corporation* v. *California Unemployment Stabilization Commission,* 116 Cal. App.2d 8, 253 P.2d 68 (1953); *Bodinson Mfg. Co.* v. *California Unemployment Commission,* 17 Cal.2d 321, 109 P.2d 935 (1941); *Lowe Brothers, Inc.,* v. *Unemployment Insurance Appeal Board,* 332 A.2d 150 (Del. Supr. 1975); D.C. Code Ann., tit. 46 § 310(f) (West 1968); *Hodory* v. *Ohio Bureau of Employment Services, et al.,* (N.D. Ohio 1976) (3 Judge Court) (Pet. App. G.), *app. filed,* 44 U.S.L.W. 3686; Penn Stats. Ann., tit. 43 § 802(d) (West 1964); Utah Code Ann., tit. 35 § 35-4-5(d) (Allen-Smith Co. 1953).

In *Geduldig, supra,* a California disability insurance system, financed by fixed employee contributions, was challenged on the sole ground that the system was underinclusive because it failed to cover disabilities resulting from normal pregnancies. In upholding the statute the Court emphasized that the one percent contribution rate bore a close and substantial relationship to the level of benefits payable and risks insured and that the State had demonstrated a strong commitment not to increase the contribution rate, *e.g.*, by expanding coverage. At bar, however, New York has not demonstrated a commitment to a steady rate.

Provision is made in the New York Labor Law § 577(2) for subsidiary contributions by employers upon a finding that the general account within the fund has dropped below specified amounts. The suspension of benefits provision itself was altered from a ten-week duration, § 504.2(b) L. 1941 c. 783 § 2 (repealed by L. 1944, c. 705, § 1), to the present seven-week provision. Moreover, unlike the exclusion in *Geduldig,* the § 592.1 suspension is financially unsound since it forces the involuntarily idled worker onto the welfare rolls.* Finally in *Geduldig,* the discrimination was found to be rationally supportable because providing parallel aggregate coverage for each class, *Id.*, at 496, and because minimizing the burden upon participating employees, particularly those in low-income brackets and hence most in need of the insurance coverage. Section 592.1 by contrast irrationally penalizes those with a minimal causal relationship to a labor dispute and does so in derogation of New York's own stated policy.

Respondent attempts to distinguish the decision in *Hodory, supra,* on the ground that the Ohio statute excludes employees for the entire duration of a dispute whereas § 592.1 suspends benefits for only seven weeks. The seven-week limitation is irrational if one accepts the premise that § 592.1 is intended to preserve a neutral stance in labor disputes, since the subsequent granting of benefits (to strikers and non-participants alike) would tend to finance a strike and violate the neutrality ideal. Moreover, the limitation is meaningless since the vast majority of strikes endure less than seven weeks. *See, "Note", 39 N.Y.U.L. Rev., supra,* at

*New York's stated policy is to finance insurance for the involuntarily unemployed by taxation levied upon employers, which directly reflects the "experience rating" of each employer. See New York Labor Law, Art. 18 and particularly § 581 thereof; *Striley* v. *Fairbanks Co., et al.,* 15 App. Div.2d 385, 225 N.Y.S.2d 177 (3rd Dept. 1952). By denying unemployment benefits to non-strikers, the burden of mitigating their financial hardships falls upon public funds instead.

876, *citing* N.Y. Dep't of Labor, *Statistics on Work Stoppage in New York State*, 1963, p. 1.*

For the reasons set forth in *Hodory, supra*, and in our petition, § 592.1 cannot withstand scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it irrationally penalizes one class of persons who lose their jobs through no fault or action on their own part, *i.e.*, those who are laid off because of a labor dispute in which they are not involved, as contrasted to the treatment of all other involuntarily unemployed individuals. Moreover, the inconsistency between the decision of the three judge federal Court in *Hodory* and the decision of the New York Court of Appeals in the instant case is so patent that review should be granted by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

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*"[O]nly about sixteen percent of the strikes in 1963 lasted more than a month." *Id.*